

Internal Revenue Service
memorandum

CC:GL-296-91
Br3:JHToor

date:

to: District Counsel, St. Paul MW:STP

from: Chief, Branch 3 (General Litigation) CC:GL:Br3

subject: Relation Between 100% Penalty and Fraud Penalty

This responds to your memorandum dated April 9, 1991, requesting advice as to whether section 6672 of the Internal Revenue Code prohibits the assertion of the 100 percent penalty assessment in any case where the addition to the tax for fraud has been applied to the corporate liability. Apparently, a position was taken at an employment tax examiner continuing education conference that where additions to the tax for fraud can apply to the corporate liability, the 100 percent penalty is barred. You were not convinced by this position. We believe that your doubts are well founded, and take the position that section 6672 does not bar the assertion of a 100 percent penalty against responsible officers whenever fraud is asserted against the corporation on the underlying employment tax liability.

Section 6672, the 100 percent penalty, in relevant part, provides:

(a) General Rule. - Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

The purpose of section 6672 is to encourage the prompt payment of withheld and other collected taxes, and to provide the Service with a secondary source of collection in the event that these taxes are not paid. The withheld taxes are commonly referred to as "trust fund taxes," reflecting the Code's provision that such withholdings or collections are

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deemed to be a "special fund in trust for the United States." See I.R.C. § 7501; Slodov v. United States, 436 U.S. 238 (1978). When the trust fund taxes are not paid by the corporation, the 100 percent penalty may be assessed against the responsible officers for willful failure to collect or pay over the taxes. Section 6672 only applies to persons responsible for collection of these trust fund taxes. See Slodov at p. 243; S. Rep. No. 1622, 83rd Cong., 2d Sess., 596 (1954); H.R. Rep. No. 1337, 83rd Cong., 2d Sess., A420 (1954).

The Service's policy is to collect the full tax only once, from the corporation or from one or more of the responsible officers. Policy Statement P-5-60 provides:

The 100-percent penalty (applicable to withheld income and employment (social security and railroad retirement) taxes or collected excise taxes) will be used only as a collection device.... The withheld income and employment taxes or collected excise taxes will be collected only once, whether from the corporation, from one or more of its responsible persons, or from the corporation and one or more of its responsible persons....

Thus, while the responsible officers' liability under section 6672 is separate and distinct from that of the corporation's, the result of section 6672 is to make the responsible officers and the corporation equally liable for trust fund taxes as co-debtors to the Government. Kelly v. Lethert, 362 F.2d 629, 635 (8th Cir. 1966); United States v. Louis Pomponio, Jr. et al., 80-2 U.S.T.C. ¶ 9820 (4th Cir. 1980).

Under the Revenue and Reconciliation Act of 1989, section 6653 of the Internal Revenue Code, which formerly contained the fraud and negligence penalty, was amended to impose only an addition to tax for failure to pay stamp tax. The penalty for fraud is now found at new Code section 6663. Section 6663 imposes a penalty at the rate of 75 percent of the portion of any underpayment of tax required to be shown on a return that is attributable to fraud. Mere negligence, or ignorance of law, does not constitute fraud. Rather, the Government has the burden to prove, by clear and convincing evidence, that some part of a tax deficiency for each taxable year in issue was due to a specific intent to evade tax. In re Clothes Barn, Inc., 90-1 U.S.T.C. ¶ 50,144 (D.Ct. N.D. Calif. 1990). A corporation is responsible for the fraudulent acts of its officers if the officer was acting on its behalf and the corporation benefitted from the fraudulent acts. Ruidoso Racing Association, Inc. v. Commissioner of Internal Revenue, 476 F.2d 502 (10th Cir. 1973).

The pertinent language at issue as provided in section 6672(a) is: "(n)o penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable." The legislative history provides:

...the application of this penalty is limited only to the collected or withheld taxes which are imposed on some person other than the person who is required to collect, account for and pay over, the tax. Under existing law this penalty is not applicable in any case in which the additions to the tax in the case of delinquency or fraud are applicable. Under this section the addition to the tax provided by section 6653, relating to negligence or fraud, shall not be applied for any offense to which this section is applicable.

See S. Rep. No. 1622, 83rd Cong., 2d Sess., 596 (1954); H.R. Rep. No. 1337, 83rd Cong., 2d Sess., A420 (1954). The last two sentences of this citation make the interpretation of section 6672 difficult. The first sentence suggests that the 100 percent penalty cannot be asserted where the fraud penalty can be asserted with respect to the underlying trust fund liability. The second sentence suggests that where the 100 percent penalty can be asserted, the fraud penalty must not be asserted for the same offense. The legislative history tends to support the view that the fraud penalty and the 100 percent penalty are mutually exclusive.

We do not believe, however, that wherever section 6653 (the old fraud penalty) is asserted, section 6672 is prohibited. This position was taken in IRM 5(10)83.33. Section 6672 only states that the fraud penalty cannot be asserted for any offense to which the 100 percent penalty can apply. We believe that this means that both the 100 percent penalty and the fraud penalty cannot be asserted for the same offense, against the same responsible officer. The statute applies only to persons responsible for collection of trust fund taxes. Slodov at p. 243. For example, this situation may occur where a responsible officer pockets the trust fund taxes for his own use. The fraud penalty could not be asserted against the corporation in this situation because the corporation did not benefit from the fraudulent act. Ruidoso at p. 506. Under section 6672, the 100 percent penalty may be asserted, but the imposition of the fraud penalty against the responsible officer is barred.

As stated previously, section 6672 encourages the prompt payment of trust fund taxes by imposing personal liability on responsible officers in the event the trust fund taxes are not paid by the corporation. The statute, however, cannot be construed to impose liability without fault. Rather, section 6672 imposes a "penalty" and is violated only by a "willful failure." Slodov at p. 245. The standard of willfulness applied by the courts does not necessarily embrace any bad motive or evil intent on the part of the responsible officer. Rather, all that needs to be shown is that the failure to collect, account for, and pay over the taxes was voluntary, conscious, and intentional. In re Clements, 90-1 U.S.T.C. ¶ 50,224 (Bank. Ct. Wyo. 1989); Burden v. United States, 486 F.2d 302 (10th Cir. 1973). Since section 6672 only applies to persons responsible for collection of trust fund taxes and punishes them for willful failure to collect or pay over taxes, we believe that by enacting this language Congress intended not to overpenalize responsible officers by making them liable for both the 100 percent penalty and the fraud penalty for the same offense.

Section 6672 should not prohibit the assertion of the 100 percent penalty against responsible officers where the addition to the tax for fraud is asserted against the corporation. Section 6672 only bars the assertion of the fraud penalty against a responsible officer liable for the 100 percent penalty. The fraud penalty applies to any underpayment of tax and should be asserted against the corporation for the fraudulent acts of its officers acting on its behalf. Congress could not have intended to relieve responsible officers of personal liability for the 100 percent penalty merely because the 75% fraud penalty has been asserted against the corporation, nor could it have intended to relieve the corporation of liability for fraud merely because the 100 percent penalty applies to its responsible officers. For example, if the corporation was not liable for the fraud penalty when section 6672 could be asserted against the responsible officers, it would benefit the corporation to use the trust fund taxes to make investments if the investments were successful, and later pay the 100 percent penalty for the responsible officers. We believe that in a situation like this, Congress intended that the fraud penalty should be asserted against the corporation and the 100 percent penalty should be asserted against the responsible officers. To interpret section 6672 otherwise, would allow the corporation a choice of remedies and limit the usefulness of section 6672 as a tool to encourage the prompt payment of trust fund taxes. Further, interpreting section 6672 not to be applicable when the fraud penalty is asserted against the corporation for the underlying trust fund liability would mean that a responsible officer who fraudulently fails to pay the trust fund liability

would fair much better than a responsible officer who did not commit fraud. We doubt that Congress intended such a result.

. Since we believe the position taken in IRM 5(10)83.33 is incorrect, we will take steps to have it amended. If we can be of further assistance in this matter, please contact Joyce Hendricks Toor at FTS 535-9678.

PETER J. DEVLIN